

**BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition for)
Reinstatement of Revoked Certificate of:)

CHARLES DONALD BAUER)

File No. 20-2005-165402

Physician's and Surgeon's)
Certificate No. G-34137)

Petitioner.)
_____)

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on November 28, 2005.

IT IS SO ORDERED October 25, 2005.

MEDICAL BOARD OF CALIFORNIA

By: _____

Steven Alexander, Chair

Panel A

Division of Medical Quality

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DIVISION OF MEDICAL QUALITY
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DEPARTMENT OF CONSUMER AFFAIRS
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In the Matter of the Petition for
Reinstatement of Revoked Certificate of:

CHARLES DONALD BAUER,

Petitioner.

Case No. 20-2005-165402

OAH No. N2005080834

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings on September 21, 2005, in Sacramento, California.

Stephen M. Boreman, Deputy Attorney General, appeared on behalf of the Attorney General of the State of California.

Albert J. Garcia, Esq. appeared on behalf of Charles D. Bauer, who was also present.

The matter was submitted for decision on September 21, 2005.

FACTUAL FINDINGS

1. On June 7, 1977, the Medical Board of California (Board) issued Physician and Surgeon's Certificate No. G 34137 to Charles Donald Bauer (petitioner).

2. Petitioner's physician and surgeon's certificate was revoked following Accusation proceedings before the Board in Case No. 03-97-74482. Under the Decision adopted by the Board on December 2, 1998, the Board determined that petitioner engaged in gross negligence and dishonesty in carrying out his responsibilities as a pathologist.

Petitioner filed a Petition for Reinstatement of Revoked/Surrendered Certificate dated February 17, 2005. It was received by the Office of Administrative Hearings and these proceedings followed.

3. The circumstances relate back to December 24, 1996. Petitioner was the pathologist responsible that day for conducting gross examinations of tissue samples received by Salinas Pathology Services, an incorporated medical group that provided pathology services to Salinas Valley Memorial Hospital. Tissue samples were received from three different patients following medical procedures that were performed on them. Petitioner conducted the gross examination of these specimens, and then placed tissue samples into cassettes, marking them with identifying ink. When the samples were being prepared for microscopic examination two days later, petitioner discovered that one of the cassettes had no tissue samples in it. He then submitted tissue from one patient for that of two others, in order to conceal the loss of two tissue specimens. He also rendered a final diagnosis of the lost tissue samples, thereby leading anyone who relied on his final reports to believe that he had conducted microscopic examinations of the tissue, when in fact he had only conducted gross examinations. Instead of later disclosing what had occurred, the Board noted in its decision to revoke petitioner's license that he "created a Byzantine explanation for his action in an effort to save his medical license." The Board's action was prompted both by the magnitude of petitioner's actions and "his complete lack of recognition of his wrongdoing or of repentance for his actions...."

4. Petitioner now acknowledges that what he did was wrong and inexcusable. He has had the benefit of five years to reflect on the facts and circumstances of this case and he now believes that his ego clouded his judgment in a "profoundly significant way." He realizes that the lost specimens could have been readily acknowledged "without the slightest adverse professional consequences" to him or anyone else. He notes that he thought he was smart enough and experienced enough to arrive at a diagnosis of the tissue samples with reasonable medical certainty, based on a non-microscopic inspection, thereby avoiding the need to disclose the loss of the tissue. He now recognizes how wrong he was.

5. Petitioner submitted a narrative statement, two and a half pages of which detail what he characterizes as mitigating circumstances. Though intending to show what he *then* believed, it is largely defensive of his actions. For example, he cites to studies supportive of his belief at that time that he could make a diagnosis with reasonable medical certainty without a microscopic examination. He also expresses his rationale for then believing that there was little or no likelihood of harm to the patients by his actions. The length and detail of his discussion, notwithstanding his stated purpose of expressing what he then believed, suggest a continued interest in defending his actions. As noted in the Board's decision in this case, the "overwhelming weight of the evidence established that when a physician refers tissue to a pathologist for evaluation, the pathologist has no discretion in determining whether or not to conduct a microscopic exam." And petitioner's rationale for doing otherwise is belied by other findings that he fully intended to engage in microscopic examination given that slides were being prepared for this very purpose.

Petitioner explains that he now realizes that issuing a final pathology report without microscopic examination was "gravely erroneous." Yet he offers other troubling comments in his narrative statement. For example, he continues to believe that the histology technician was responsible for the loss of the tissue specimens. Although sufficient evidence was not

presented to show that this was true, he states unequivocally that she was at risk of termination based on the precedent of a prior technician being terminated for mislabeling a sample. He notes, "Under that precedent and that stringent standard, the technician in question would have been terminated as well." Petitioner suggests that his wrongful actions were motivated by an altruistic desire to protect the technician. However, such motive was completely discounted in the Board's decision:

At the hearing, respondent asserted that another histology technician had been terminated sometime before December 1996 for mislabeling tissue. But it was established that no histology technicians had ever been terminated from Salinas Pathology Services for isolated incidents of mislabeled tissue. Cathy Meyer has worked in the hospital's lab for 11 years and is a histology supervisor. She has no history of mislabeling specimens any more than normally occurs in the lab. While it is certainly possible that as respondent has implied, it was Ms. Meyer and not respondent who lost the two specimens involved here, there is no evidence that her job would have been in jeopardy because of this. Respondent's assertion that he was somehow protecting Ms. Meyer bears no validity.

Petitioner was asked by Board investigator Roberto Moya, as part of an interview relating to his petition for reinstatement, how he would handle "this type of situation in the future." His response at that time was more an explanation for past actions than assurances that such conduct would not recur.¹

6. Petitioner successfully completed a two-week clinical program through the Physician Assessment and Clinical Education (PACE), University of California, San Diego, Department of Pathology. The curriculum included specimen storage, labeling, identification, small tissue handling, skin specimen protocols, inking, gross description, cassette summary and laboratory compliance guidelines. In addition, he has completed over 2700 hours of continuing medical education credits over the past five years, many of them in pathology.

Since April 2000, petitioner has been actively involved as a volunteer with the Salinas Public Library Literacy Services Program, tutoring new adult readers in basic literacy skills. He has submitted two letters from physicians supportive of his petition for reinstatement. J. Anthony Smith, M.D., is his treating physician. Petitioner was diagnosed with colon cancer in 2003, which he has battled successfully. Dr. Smith believes that petitioner's personal experience with malignancy "has dramatically increased his sensitivity to the needs of patients and his capacity for empathy." William Berg, M.D., worked together with petitioner

¹ Roberto Moya wrote in his report: "On the issue of honesty, he believed that back then, it was the best way to protect the employment of his technician for losing the specimen. Bauer also said at the time of the incident, he did not believe there would be any effect on the patient care or diagnosis. Bauer believes it was an administrative issue and not a medical one. I asked Bauer if he could prove the technician was the one who lost the specimen. Bauer said he has no proof, but regrets how he handled the situation."

on a hospital's medical executive committee. He believes petitioner "sincerely regrets his negligence and dishonesty, has learned from his mistakes and is committed to practicing the highest standard of patient care."

7. Petitioner has acknowledged wrongdoing and he has apparently learned important lessons. He has taken important steps towards rehabilitation from the time of the Accusation proceedings. He has also maintained his professional knowledge and skills through PACE and continuing medical education courses. However, the major concern in this case has little to do with medical skill or competency. It has everything to do with petitioner's character – specifically, whether he can now be trusted to disclose medical errors, to be completely honest about his conduct, and to assume responsibility when mistakes are made.

Petitioner knowingly betrayed the trust of both his partners in Salinas Pathology Services, and the physicians who referred the samples to the lab for evaluation. Though he understands this, he continues to explain that he was trying to defend a histology technician from certain termination, evidence for which the Board found no validity. He has yet to assume full responsibility for what were truly egregious actions. The tenor of petitioner's narrative statement was decidedly mixed, both accepting responsibility for wrongdoing, but also attempting to place wrongdoing in a more positive context. Given the severity of petitioner's actions, the potential for patient harm, and lingering questions over the extent to which he has fully rehabilitated, it would not be in the public interest to issue him a probationary license at this time.

LEGAL CONCLUSIONS


1. Under Business and Professions Code section 2307, a person whose certificate has been revoked may petition the Division of Medical Quality for reinstatement after a period of not less than three years.

2. Petitioner bears the burden of proving rehabilitation and he must demonstrate by the most clear and convincing evidence that efforts made towards rehabilitation have been successful. (*Calaway v. State Bar* (1986) 41 Cal.3d 743; *Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092.) Petitioner has not met this burden here. In making this determination, the matters set forth in Findings 3 through 7 have been considered. Petitioner has not demonstrated that his efforts towards rehabilitation have been successful. He is not substantially rehabilitated and it would not be in the public interest to issue him a probationary license at this time.

ORDER

The Petition for Reinstatement of Revoked Certificate of Charles D. Bauer is denied.

DATED: 10/7/05



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings